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No. 05-8794

IN THE

Supreme Court of the United States

CLARENCE EDWARD HILL,
Petitioner,

v.

JAMES R. McDONOUGH, INTERIM SECRETARY OF THE FLORIDA DEPARTMENT OF CORRECTIONS, in his official capacity, *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICUS CURIAE* NEW JERSEYANS FOR ALTERNATIVES TO THE DEATH PENALTY IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Founded in 1999, *amicus curiae* New Jerseyans for Alternatives to the Death Penalty (NJADP) (formerly known as New Jerseyans for a Death Penalty Moratorium (NJDPM)) is a 10,000 member grassroots organization that attempts to effect change in New Jersey's use and administration of the death penalty through legislative, executive and legal action. NJADP urges this Court to reverse the ruling of the United States Court of Appeals for the Eleventh Circuit in favor of Respondents.

In particular, NJADP respectfully submits this brief in support of Petitioner Clarence Edward Hill, who brought this action under 42 U.S.C. § 1983, seeking declaratory and injunctive relief because Florida's lethal injection protocol results in an unreasonable risk of unnecessary pain and suffering, and, as such, constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution. *Amicus curiae* submits that States should be required to account for their lethal injection protocols and procedures and that such protocols and procedures should be based upon reasoned medical opinion and sound scientific evidence. Only through the adoption of reasoned protocols and procedures can States insure that the administration of lethal injection will not result in the significant likelihood of unnecessary pain and suffering.

SUMMARY OF THE ARGUMENT

The question before this Court is whether a challenge to a specific lethal injection protocol is cognizable under 42 U.S.C. § 1983. Are such claims "properly viewed as challenges to the conditions of a condemned inmate's death sentence," or do they fall "within the core of federal habeas

corpus?'" *See United States v. Nelson*, 541 U.S. 637, 643-44 (2004). Such challenges to a lethal injection protocol are cognizable under Section 1983 and do not fall within the core of federal habeas corpus.

First, a challenge to a specific lethal injection protocol is cognizable under Section 1983. The Eighth Amendment bars the unnecessary infliction of pain and suffering. Petitioner alleges that, as it is administered, there is a significant likelihood that Florida's lethal injection protocol will result in unnecessary pain and suffering. In order to avoid this significant likelihood, a State's lethal injection protocols and procedures must be based upon reasoned medical opinion and evidence. In most States, including Florida, such protocols and procedures are not based upon reasoned medical opinion and evidence. As such, most States fail to insure that lethal injection is properly administered, resulting in a significant likelihood of unnecessary pain and suffering. Hence, Petitioner presents a cognizable claim under Section 1983.

Second, a challenge to a specific lethal injection protocol does not imply the invalidity of the conviction or death sentence, and hence does not fall within the core of habeas corpus. Rather, such a claim challenges the conditions under which the inmate will be executed, not the fact of the execution itself. Because States are free to adopt reasonable, constitutional alternatives to the challenged protocol, a challenge to a lethal injection protocol, even if successful, will not imply the invalidity of the underlying conviction and sentence.

Thus, Petitioner Hill's claim regarding Florida's specific lethal injection protocols was appropriately brought under Section 1983. As such, this Court should reverse the ruling of the Eleventh Circuit Court of Appeals.

ARGUMENT

I. PETITIONER'S CLAIM DOES NOT SOUND IN HABEAS CORPUS, BUT RATHER STATES A COGNIZABLE CLAIM UNDER SECTION 1983.

A. A Challenge To A Particular Lethal Injection Protocol Is Cognizable Under Section 1983.

Section 1983 authorizes a "suit in equity, or other proper proceeding for redress" against any person who, under color of state law, "subjects, or causes to be subjected, any citizen of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution." 42 U.S.C. § 1983. Petitioner's complaint states such a claim. He alleges that the State of Florida, under color of state law, will subject him to a deprivation of a right secured by the Constitution, namely the right to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments. *See* U.S. Const. amends VIII and XIV.

The Eighth Amendment prohibits the "unnecessary and wanton infliction of pain." *Gregg v. Georgia*, 428 U.S. 153, 173 (1976). Punishments are considered unnecessary or wanton when they are either "barbaric" or "excessive in relation to the crime committed." *Coker v. Georgia*, 433 U.S. 584, 592 (1977). A punishment is excessive if it "makes no measurable contribution to acceptable goals of punishment and hence is nothing other than the purposeless and needless imposition of pain and suffering." *Id.* at 592. Indeed, this Court has long held that the Eighth Amendment protects prisoners from the "gratuitous infliction of suffering." *Gregg*, 428 U.S. at 183 (citing *Wilkerson v.*

Utah, 99 U.S. 130, 135-36 (1878) and *In re Kemmler*, 136 U.S. 436, 447 (1890)). Here, Petitioner claims that Florida's lethal injection protocol will result in the unnecessary and wanton infliction of pain. He alleges that there is a significant likelihood that the improper administration of anesthesia will result in a torturous death, which would constitute "the purposeless and needless imposition of pain and suffering." *Coker*, 433 U.S. at 592. Thus, Petitioner states a cognizable claim under Section 1983.

Florida, like a majority of States, employs a three-drug protocol for carrying out executions by lethal injection. *See Sims v. State*, 754 So. 2d 657, 666 n.17 (Fla. 2000). The protocol contemplates that a succession of three drugs will be administered intravenously to the death-sentenced prisoner. *See id.* at 687. The first drug -- administered in a nonlethal dose -- is an "ultra-short acting barbiturate," typically sodium thiopental, the function of which is to induce a loss of consciousness; the second is a neuro-muscular blocking agent, typically pancuronium bromide, which is a muscle relaxant and paralyzes the diaphragm and the lungs; and the third is potassium chloride, which induces cardiac arrest. *See id.*; Report of Mark Heath, M.D., dated February 13, 2004, at ¶¶ 7, 10, 14 (proposed to be lodged, pursuant to Rule 32.3, with the Clerk of the United States Supreme Court; also on file with counsel);[1] Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution And Lethal Injection And What It Says About Us*, 63 OHIO ST. L.J. 63, 97-98 (2002).[2]

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[1] This document was submitted as public comment in connection with the NJDOC's public hearing regarding proposed amendments to the Department's lethal injection regulations.

[2] Today, lethal injection is the exclusive method of execution in 27 states. In 9 others, there is a choice of methods, one of which is lethal injection.

Petitioner's challenge to the three-drug protocol alleges that there is a significant likelihood that the short-acting barbiturate will not be administered properly, in which case he will be insufficiently anesthetized. *See* Heath Report, at ¶ 5. Without appropriate anesthesia, an affected prisoner will suffer excruciating pain when the two other drugs that make up the protocol are administered. *See id.* The neuromuscular blocking agent, which has no anesthetic properties, will completely paralyze the inmate, but leave him conscious and awake as he suffocates. *See id.* at ¶ 10; Denno, *supra*, at 109 n. 321 (noting that if the short-acting barbiturate wears off, "'the prisoner will suffer an extremely painful sensation of crushing and suffocation, as the pancuronium bromide takes effect and stops his ability to breath'" (*quoting* Affidavit of Edward A. Brunner, M.D., Ph.D., Exhibit B of Verified Complaint in Chancery, Gacy v. Peters, No. 94 CH (Ill. Apr. 1994)); *see also Chaney v. Heckler*, 718 F.2d 1174, 1191 (D.C.Cir. 1983), *rev'd on other grounds*, 470 U.S. 821 (1985) ("Indeed, even a slight error in dosage or administration can leave a prisoner conscious but paralyzed while dying, a sentient witness of his or her own slow, lingering asphyxiation."). And the potassium chloride will cause an "excruciating searing or burning sensation that is likened to that of boiling oil or branding with a hot iron." *See* Heath Report, at ¶ 15.[3] Thus, if the dosage of sodium thiopental is too low or if it is improperly administered, the inmate "will regain consciousness only to find himself paralyzed by the pancuronium and then experiencing the agony of intravenous concentrated potassium injection." *See* Heath Report, at ¶ 7.

See Denno, *supra*, at 90-94. Thus, there are 36 states that authorize the use lethal injection as a method of execution.

[3] Notably, "[t]here are many possible alternative drugs or chemical agents that are equally effective in causing and maintaining cardiac arrest but do not cause pain." Heath Report, at ¶ 18.

In light of the potential for excruciating pain in the administration of the three-drug protocol, States must insure that their protocols and procedures for administering lethal injection are adopted on the basis of medical expertise regarding the proper administration of anesthesia. Where such protocols are, to the contrary, based upon an utter lack of expert opinion and scientific evidence, they are arbitrary and cannot be justified in light of the proscription on cruel and unusual punishment. *See Overton v. Bazzetta*, 539 U.S. 126, 136-37 (2003). Thus, in 2001, the New Jersey Department of Corrections (NJDOC) proposed to readopt and amend the regulations setting forth New Jersey's lethal injection protocol. *See* 33 N.J.R. 2991(a) (Sept. 4, 2001). NJADP brought an action challenging these regulations on state and federal constitutional and administrative-law grounds, alleging, *inter alia*, that the regulations violated the proscription on cruel and unusual punishment and that they lacked an appropriate administrative record. *See In re Readoption With Amendments of Death Penalty Regulations*, 367 N.J. Super. 61 (App. Div. 2004), *cert. denied* 182 N.J. 149 (2004). In that action, the court held that several of New Jersey's lethal injection regulations lacked an adequate administrative record that would demonstrate that they were based upon "reasoned medical opinion." *In re Readoption*, 367 N.J. Super. at 69. The court stated that its concern was "that DOC itself does not have medical expertise, and nothing in the record suggests medical consultation and opinion." *See id.* at 69. Without such a record of medical consultation and opinion, the court found, NJDOC was unable to show that the regulations at issue comported with "contemporary standards of decency and morality," and hence were not violative of the proscription on cruel and unusual punishment. *See id.*[4] The court therefore remanded

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[4] In considering whether a punishment is "cruel and unusual," this Court considers society's "'evolving standards of decency that mark the

the matter to NJDOC for "further consideration" and the opportunity to articulate "a supporting basis for those determinations." *See id.* at 68. Without such a basis, the regulations could not be implemented without running afoul of the proscription on cruel and unusual punishment.

Such principles apply here as well. States must base their protocols on reasoned medical opinion in order to insure that lethal injection does not constitute cruel and unusual punishment through the arbitrary infliction of pain and suffering. Yet, Florida, and other States, have failed to base their lethal injection protocols on reasoned medical opinion and scientific evidence. The three-drug protocol, now widely in use in Florida and numerous other States, was not adopted on the basis of such "reasoned medical opinion." *Id.* at 69. In fact, the three-drug protocol was first adopted in Oklahoma in 1977, based upon the informal advice of one physician. *See* Don Colburn, *Oklahoma Was the First*, WASH. POST, Dec. 11, 1990, at 14. That advice was in the form of a short letter to a state senator by Dr. Stanley Deutsch, who was then the head of Oklahoma Medical School's Anesthesiology Department. *See* Denno, *supra*, at 95. Dr. Deutsch suggested that lethal injection be carried out through the administration of an "ultra shorting acting barbiturate" and a "neuromuscular blocking drug." *See id.* at 95 n.207 (reprinting Dr. Deutsch's letter). In response, Oklahoma statutorily adopted a protocol which accepted, nearly verbatim, the terminology in his letter. *Compare* Okla. Stat. Ann. tit. 22, § 1014(A) *with* Denno, *supra*, at 95-96 n. 207. Other States followed Oklahoma without further scientific inquiry. *See* Denno, *supra*, at 97-98; *see also* Stephen Trombley, THE EXECUTION PROTOCOL: INSIDE AMERICA'S CAPITAL PUNISHMENT INDUSTRY 70-75 (1992). It is unclear why potassium chloride was subsequently added

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progress of a mature society.'" *Atkins v. Georgia*, 536 U.S. 304, 311-12 (2002) (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958)).

to the standard protocol, but there is reason to believe that it was at the suggestion of Fred Leuchter, who was neither a doctor nor a scientist, but an individual who invented execution devices which he sold to States around the country. *See* Trombley, *supra*, at 76-77. According to Leuchter, because there was no medical literature specifying the dosages of drugs that would be lethal, he relied on information that was available for pigs and estimated accordingly. *See id.* at 77-78. Leuchter later conceded that the information available was based upon a lethal injection that was carried out on only one pig. *See id.*

Moreover, Florida's lethal injection protocol and procedures do not even purport to be premised on such a reasoned basis, as they are created by Florida's Department of Corrections (FLDOC) without public scrutiny or formal rulemaking. In fact, Florida's lethal injection statute does not limit FLDOC's discretion in any way; nor does it require FLDOC to promulgate regulations implementing its lethal injection procedures. *See* Fla. Stat. § 922.105(5) (providing that a "death sentence shall be executed by lethal injection, unless the person sentenced to death affirmatively elects to be executed by electrocution"). Thus, there are no substantive or procedural reins upon the FLDOC's discretion to adopt, modify, or deviate from any particular protocols or procedures. Indeed, Florida's lethal injection protocols are not even publicly available. And, they can be changed at any moment, up until the eve of execution.[5] Thus, FLDOC is not required to justify any of its lethal injection procedures in light of reasoned opinion.

It is evident that such protocols -- adopted without a basis in expert opinion and evidence -- are arbitrary and lack

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[5] In many states, protocols are not publicly available. *See* Denno, *supra*, at 116-17. In some states, the protocols are confidential or simply nonexistent. *See id.* at 117.

a reasonable medical basis. In specific, most State protocols entirely fail, in certain key respects, to insure the proper administration of lethal injection in light of the potential for excruciating pain in the absence of appropriate anesthesia.

First, lethal injection is most often carried out by individuals who have little or no expertise or training. *See* Herb Haines, *Primum Non Nocere: Chemical Execution and the Limits of Medical Social Control*, 36 SOC. PROBS. 442, 445-46 (1989); Harold L. Hirsh, *Physicians as Executioners*, LEGAL ASPECTS OF MED. PRAC. 1, 102 (Mar. 1984). In fact, most state protocols, including Florida's, do not specify who the executioners will be or what type of training they must have in order to administer lethal injection. *See* Denno, *supra*, at 121-22.

However, unless anesthesia is administered and monitored by individuals with adequate training, there can be no assurance that it will take effect and be adequately maintained. *See Morales v. Hickman*, -- F.Supp.2d. --, 2006 WL 335427, at *7 (N.D. Cal. Feb. 14, 2006), *aff'd*, __ F.3d __, 2006 WL 391604 (9th Cir. Feb. 19, 2006), *cert. denied*, No. 05-9291, __ S. Ct. __, 2006 WL 386765 (Feb. 20, 2006); Heath Report, at ¶¶ 18-23 (criticizing New Jersey's challenged protocol because it makes no attempt to provide for the assessment and verification of anesthetic depth to insure the loss of consciousness, or muscle response and response to noxious stimuli -- monitoring which is routinely required when similar drugs are administered to animals). Moreover, numerous aspects of the procedure require expertise. For example, there are several ways in which the intravenous administration of the drugs can fail, including through the incorrect insertion of the catheter into the tissues around the vein, the migration of the catheter, the perforation, rupture or leakage of the vein if too much pressure is administered, and the failure to properly loosen or remove a tourniquet or restraining straps that might impede

the absorption of the drugs. *See* Heath Report, at ¶ 9 (describing other common problems with the administration of intravenous drugs, including but not limited to a leaking IV and errors in labeling or in selecting the correct syringe). In addition, the condition of each prisoner's veins, relevant in terms of obtaining intravenous access, varies widely; indeed, such access can be extremely difficult to obtain, even for a medical professional, let alone an untrained executioner. *See On Lethal Injections and the Death Penalty*, 12 HASTINGS CENTER REP. 2, 2 (Oct. 1982) (explaining that lethal injections are particularly difficult to administer "to people with heavily pigmented skins . . . and to diabetics and drug users"); *Another U.S. Execution Amid Criticism Abroad*, N.Y. TIMES Apr. 24, 1992, at B7 (reporting that the difficulty in executing Billy Wayne White was due to his history as a heroin user); Thomas O. Finks, *Lethal Injection: An Uneasy Alliance of Law and Medicine*, 4 J. LEGAL MED. 383, 397 (1983) (explaining that "(a)s many as one in four prisoners may have veins that are hard to get at because they are deep, flat, covered by fat or damaged by drug use"); Suzanne McBride, *Problem With Vein Delays Execution*, INDIANAPOLIS NEWS, July 18, 1996, at 1 (describing a 1998 Indiana execution in which it took 49 minutes to find the veins, sticking needles into body).

Moreover, few States specify the dosages of the drugs to be administered, by statute, by regulation or even by written protocol. *See* Denno, *supra*, at 119 (noting that only nine States specify the quantities to be administered and that even in those States the protocol may only set forth a particular volume, which does not provide any information about the potency of the drug to be administered).[6] Without

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[6] Florida's protocol does not mention the "volume of fluid used to dissolve" the sodium pentothal. *See* Denno, *supra*, at 119. Thus, the concentrations of the three chemicals are not specified in the protocol, making it impossible to know if sodium pentothal is being effectively administered. *See id.*

doing so, it is impossible to ascertain whether or not the inmate undergoing lethal execution is properly anesthetized. Nor do States require, for example, that the dosages administered account for each prisoner's physical characteristics, assuring that the prisoner will remain anesthetized during the course of his execution. *See* Finks, *supra*, at 397 (noting that "(a)ge, sex, and body weight all contribute to the individual's response to the drug[s]" used in lethal injection); Denno, *supra*, at 117-19. Some prisoners may need a higher dosage of thiopental than others "before losing consciousness and sensation." *See* Denno, *supra*, at 353. Thus, the failure to specify the appropriate dosages, including taking into account the individual characteristics of the person to be executed, in addition to the lack of adequate training required of the executioners, results in the significant likelihood of improper administration of the death penalty and unnecessary pain and suffering.

In sum, lethal injection protocols and procedures which do not prescribe the appropriate dosages in order to insure proper anesthesia, and which fail to provide that lethal injection be carried out by adequately trained individuals, are not based upon reasoned medical opinion and scientific evidence and will result in a substantial likelihood of an inhumane and torturous death by lethal injection. Thus, such protocols do not accord with contemporary standards of morality and decency and instead constitute cruel and unusual punishment. Because the significant likelihood of an inhumane and tortuous death would constitute cruel and unusual punishment, Petitioner states a cognizable claim under Section 1983.

B. A Challenge To A Particular Lethal Injection Protocol Does Not Imply The Invalidity Of The Conviction Or Death Sentence.

However, even if Petitioner states a cognizable Section 1983 claim, this claim will yield to the more specific federal habeas corpus statute, *see* 28 U.S.C. § 2254, with its attendant procedural and exhaustion requirements, *see* 28 U.S.C. § 2244, if he seeks injunctive relief challenging the fact of his conviction or the duration of his sentence. *See Preiser v. Rodriguez*, 411 U.S. 475, 489 (1973). If a claim falls within the "core" of habeas corpus, that is, if it amounts to a challenge to the fact or duration of a sentence, it is not cognizable when brought pursuant to Section 1983. *See id.* The question is whether a judgment in favor the plaintiff "would necessarily imply the invalidity of his conviction or sentence." *Heck v. Humphrey*, 512 U.S. 477, 487 (1994).

Petitioner Hill seeks a permanent injunction that will bar the state from executing him "in the manner they currently intend." Compl., at ¶¶ 19-20. He does not seek relief from judgment, execution or even death by lethal injection. Rather, his claim alleges that the administration of Florida's lethal injection protocol will result in a significant likelihood of unnecessary pain and suffering. Even if his claim is successful, the State is free to adopt constitutionally acceptable alternatives to the current protocol, alternatives that are based upon medical expertise and scientific evidence and which will not result in a significant likelihood of unnecessary pain and suffering. Thus, Petitioner's challenge is not equivalent to a challenge to the underlying conviction or sentence. *See Nelson*, 541 U.S. at 644 (noting that "simply by altering its method of execution," the State can go forward with the sentence).

Instead, a challenge to a lethal injection protocol is challenge to the way in which lethal injection is carried out.

Such a challenge contends that the failure to insure proper anesthesia through sufficient and individualized dosages of the ultra-short acting barbiturate and the failure to provide that adequately trained individuals carry out the execution results in a significant likelihood of pain and suffering. As such, a challenge to a lethal injection protocol is equivalent to a conditions of confinement claim. *See id.* (reasoning that a claim challenging an aspect of lethal injection, as opposed to lethal injection itself or execution more generally, is no different than a "'deliberate indifference' challenge to the constitutionality" of a particular procedure (*quoting Estelle v. Gamble*, 429 U.S. 97 (1976)). Petitioner does not challenge lethal injection as a method of execution or refuse to concede reasonable alternatives. *See id.* at 645 (noting that petitioner was not unable or unwilling to concede "acceptable alternatives" to the challenged procedure). Petitioner challenges certain specific aspects of lethal injection protocol and its administration. Thus, this claim does not sound in habeas corpus because success on the merits will not "necessarily imply that" the death sentence at issue is unlawful. *See Nelson*, 541 U.S. at 644.

CONCLUSION

For the foregoing reasons, the Court should reverse the ruling of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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